MISCELLANY.

PUBLIC SERVICE COMPANIES—REGULATION OF CHARGES—CLASSIFICATION.—Questions of the most profound significance were mooted and debated (if not absolutely decided) in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, of which an unofficial statement was published in 23 Nat. Corp. Rep. 462.

The statute of Kansas, defining the status of public stock yards, and regulating their charges, was held to be in violation of the Fourteenth Amendment, in that it applies only to the Kansas City Stock Yards Company, and not to other companies engaged in like business in Kansas.

Speaking of the rule of regulation established in *Munn* v. *Illinois*, 94 U. S. 113, the court agreed to the proposition that although the Stock Yards is not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and, therefore, must be considered as subject to governmental regulation.

Speaking of the classification by the State into stock yards doing a large, and those doing a small business (without any other motive for classification), Judge Brewer, for the majority, asked this significant question: "Is it true that in this country one who, by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits?"

As the Fourteenth Amendment forbids any State to deny to any person, within its jurisdiction, the equal protection of the laws, the Kansas statute was held void, as a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do.

A study of the opinion, which contains many intentional dicta, will reveal mooted principles which have a wide-reaching influence upon the results of aggregated capital and corporate industries, which control the business of the whole country.—*National Corporation Reporter.*

STATUTE MAKING.—The time for making and amending statutes is at hand. Our attention has been called to the matter by some observations which appear in a recent number of the *The Law Times* (England.) We are not aware whether the Archbishop of Canterbury has any special knowledge of the subject, but when recently presenting prizes to the pupils of the Royal Grammar School at Sheffield, he said: "What a gain it would be if our legislatures knew grammar enough to make laws perfectly intelligible. As it was, legislators made laws, and then we employed a highly trained body of men—and highly paid too—to say what these laws meant." There is unfortunately too much truth in the above. His Lordship, however, apparently did not know where the difficulty lay.

Sir Henry Fowler, President of the Incorporated Law Society, after his opening address at Oxford last month, referring to the same subject, explained it in

the following remarks: "It has been for many years my privilege to take a share in legislation, and while as a member of Parliament I resent (and that is not too strong a word to use) the sneers with which some judges (both of superior and inferior courts) criticise the drafting of Acts of Parliament, I am ready to admit that our present system is capable of improvement. Bills drawn by the eminent lawyers who are the permanent, impartial and able servants of the government for the time being, are often marred and muddled by badly drawn amendments adopted in a hurry by the committee to whom such bills are referred." The result of all this is of course confusion, inconsistencies and difficulties of construction, and the "highly trained body of men" above referred to have to be called in to try and find out what the legislature meant.

Some curious illustrations of the result of these ill-considered alterations are given by our contemporary, which we may here reproduce: "A good instance was cited by Lord Stanhope, of the House of Lords, in 1816. A statute enacted the punishment of fourteen years' transportation for a particular offense, and upon conviction *'one-half thereof* should go to the King, and one-half to the informer.' Mr. Sergeant Robinson, in his Reminiscenses of Bench and Bar, alludes to the celebrated instance of the statute for the rebuilding of the Chelmsford gaol. An early clause prescribed that prisoners should be confined in the old gaol until the new one was built, but at the last moment a section was added to the effect that the new prison should be constructed out of materials of the old one, and the bill passed for the time without the detection of the glaring inconsistency."

In the address above referred to, Sir Henry Fowler makes a suggestion which is worthy of the consideration of the legislatures in this Dominion: "Bills in Parliament, after they have passed the gauntlet of Parliamentary discussion, should be referred back to the official parliamentary counsel for their report as to the wording of such bills after they have passed through committee, so that an opportunity should be afforded of amending any error of language and any confusion of meaning."

That something should be done to remedy the evil is manifest, and there does not seem to be any way to do it other than in some such way as above suggested. In the Dominion Houses bills should be referred to the Law Clerks after they have passed through the special committee to which they were referred. It is exceedingly strange that at this the most important stage of a bill the officer who is supposed to see that it is in proper shape has no power to correct even an obvious error or prevent an absurdity. After the bill has passed the committee of the whole House it should then be again referred to the Law Clerk for a final revision before its third reading.

Time should certainly be taken to have bills revised *before* they are finally disposed of by the House, instead of rushing them through their last stages, as is usually done. Where there are two Houses there is fortunately an opportunity for the Law Clerks (to whom each bill is sent after its passage for the purpose of being put in shape for the transmission to the other House) to call attention to errors which may be corrected in such other House. But even then, when the rush takes place, little can be done in the way of revision. The difficulty is, of course, much greater when there is only one House. With so many lawyers in our legislatures, surely some one could be found who would draw attention to the evil and urge a remedy.—*Canada Law Journal.*

INTENT AS AFFECTED BY DRUNKENNESS.—It is to be regretted that the law with regard to civil suits in which the question of drunkenness arises has been left in a form far more indefinite than that of the criminal law. In the latter branch of the law the rule is well established that intoxication, though no defence, may be given in evidence to show the lack of specific intent. Though the general trend of civil decisions is in accord with this doctrine, that an act of a drunkard is still his voluntary act, there are several cases which tend to obliterate the distinction. In a recent suit on an insurance policy, under which the insurer was relieved of liability for intentional injuries, the insured had his thumb bitten by a drunken man. Although the court held that the facts showed an intentional injury, it was indicated that one may become so intoxicated as to be incapable of having an intention. *Northwestern Benevolent Society* v. *Dudley*, 61 N. E. Rep. 207. Opposed to this *dictum* is a decision in a slander suit where evidence of the defendant's drunkenness was held inadmissible. *Mix* v. *McCoy*, 22 Mo. Ap. 488. The latter case is undoubtedly the sound one, as the offence—voluntarily uttering the words—was committed irrespective of malice or of any particular state of mind. The distinction accepted by the criminal law, that a drunkard's act, though voluntary, may be unaccompanied by any particular state of mind, seems now to be gradually being adopted in both tort and contract cases. According to the text writers, both at law and in equity, to-day a contract made by one utterly deprived of the use of his reason by drunkenness or otherwise is generally considered void, either on grounds of policy, Markby, Elements of Law, 5th ed., sec. 754; or because there can be no deliberate intention to assent. Story, Eq. Jurisp., sec. 231; Bishop, Non-Contract Law, sec. 513; Pothier, Traité des Obligat., sec. 49. The modern English cases are in accord with this view. *Pitt* v. *Smith*, 3 Camp. 33; *Gore* v. *Gibson*, 13 M. & W. 623. But Pollock, C. B., in a later case has intimated that under no conditions is the contract absolutely void. *Matthews* v. *Baxter*, L. R. 8 Ex. 132. This shows a tendency to revive the harsher early English doctrines. 4 Bl. Com. 26. In the United States, although the authorities are in hopeless conflict, the general tendency is to consider the contract as void. This view seems correct on principle, as there can be no contract if one party, through drunkenness or any other cause, is incapable of giving assent.

In equity, and now at common law since the introduction of equitable defences, contracts made while merely under the influence of liquor are voidable, but only if the other party has obtained an unfair advantage or has purposely caused the intoxication. *Cooke* v. *Clayworth*, 18 Ves. 12; *Crane* v. *Conklin*, 1 N. J. Eq. 346. With regard to testamentary capacity a sound doctrine has been established. Intoxication at the time of making a will does not invalidate it if the testator comprehended the nature of the act. *Bannister* v. *Jackson*, 45 N. J. Eq. 702; *Key* v. *Holloway*, 7 Baxter (Tenn.) 575. Where a testator destroys his will, either while suffering from delirium tremens or when merely under the influence of liquor it is held to be not revoked. *Brunt* v. *Brunt*, L. R. 3 P. & D. 37; *In the Goods of George Brassington, deceased*, 18 T. L. Rep. 15. These decisions are clearly correct, as a valid revocation requires an *animus revocandi*.

It seems impossible, after a review of the authorities, to deduce any broad principle with which all the cases where the effect of intoxication upon intent is in issue may be reconciled. The true rule in contracts and torts as well as in criminal law seems to be that if a specific intent or a special state of mind is

necessary for liability, evidence of drunkenness is admissible to negative it, otherwise not. The *dictum* in the principal case is too sweeping, apparently recognizing no distinction between an act intentionally, that is voluntarily, done, and an act done with specific intent, that is an intention ulterior to the mere moving of the muscles.—*Harvard Law Review.*

RECOVERY FOR INJURIES SUSTAINED IN VOLUNTARY FIGHT.—In its recent decision in *Lund* v. *Tyler* (88 N. W. 333) the Supreme Court of Iowa administered a rule of law which has considerable authority to support it—indeed, is according to the decided weight of authority—but which, nevertheless, we think is open to objection on the score of abstract justice and general expediency. It was held that, in an action to recover damages for an assault, the fact that plaintiff challenged defendant to a combat in which the injury was sustained, used insulting language, and by words and actions provoked the altercation, constituted no defense. The decision is founded on authority without independent discussion. The following comprises the gist of what was said on the point:

"The weight of authority is that, where a combat involves a breach of the peace, the mutual consent of the parties thereto is to be regarded as unlawful and as not depriving the injured party, or, for that matter, each injured party, from recovering damages for injuries received from the unlawful acts of the other (*Shay* v. *Thompson*, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538; *Stout* v. *Wren*, 8 N. C. 420, 9 Am. Dec. 653; *McCue* v. *Klein*, 60 Tex. 168, 48 Am. Rep. 260; *State* v. *Burnham*, 56 Vt. 445, 48 Am. Rep. 801). This view of the law is stated without qualification in Cooley, Torts (2d ed. 187). Insulting conduct and language of the plaintiff towards the defendant might, no doubt, have been considered in mitigation of damages, if so pleaded, but that question was not presented in the lower court."

To the cases so cited there might be added *Adams* v. *Waggoner* (33 Ind. 531), and *Willey* v. *Carpenter* (Vt. 15 L. R. A. 853). Many of the authorities rely upon Judge Cooley's reasoning in his treatise on Torts above referred to, and it therefore will be well to quote it:

"It is implied, in an assault or battery, that it is committed against the assent of the person assaulted; but there are some things a man can never assent to, and therefore his license in such cases can constitute no excuse. He can never consent, for instance, to the taking of his own life. His life is not his to take or give away; it would be criminal in him to take it, and equally criminal in anyone else who should deprive him of it by his consent. The person who, in a duel, kills another, is not suffered to plead the previous arrangements and the voluntary exposure to death by agreement as any excuse whatever. The life of an individual is guarded in the interest of the State, and not in the interest of the individual alone; and not his life only is protected, but his person as well. Consent cannot justify an assault. But suppose in the duel one is not killed, but only wounded; may he have an action against his adversary for this injury? If there is any reason why he may not, it must be because he has consented to what has been done. *Volenti non fit injuria.* But if he had no right or power to consent, and the consent expressed in words was wholly illegal and void, the question then is, how a consent which the law forbids can be accepted in law as a legal protection. Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance the erection of which he concurred in or countenanced. He is not injured by a negligence which is partly chargeable to his own fault. A man may not even complain of the adultery of his wife which he connived at or assented to. If he concurs in the dishonor of his bed the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the

questions arise between the parties alone. But in case of a breach of the peace it is different. The State is wronged by this, and forbids it on public grounds. If men fight, the State will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. There are three parties here, one being the State, which, for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is, therefore, clear and unquestionable, that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order; such as slight batteries in play or lawful games, such unimportant injuries, as even when they constitute technical wrongs, may well be overlooked and excused by the party injured, if not done of deliberate malice. But an injury, even in sport, would be an assault, if it went beyond what was admissible in sports of the sort, and was intentional."

With the greatest deference for the distinguished jurist, it may be suggested in rejoinder that the fact that a person's consent to his death or injury cannot be permitted to characterize the criminal character of an act, would not necessarily preclude attaching an entirely different significance to such consent in a civil action for the recovery of damages. The above argument consists of transplanting a highly proper rule of the criminal law into the civil law where its effect is not conducive to good results. The offense of adultery would seem to be an unfortunate illustration of a case "in which the questions arise between the parties alone." In many of the States adultery constitutes a crime, and there is scarcely any offense outside of the serious crimes of violence with which public policy more generally concerns itself. This extract from Cooley on Torts indeed starts out with an artificial and fictitious premise which, in our judgment, vitiates its logic. The learned author remarks: "There are some things a man can never assent to, and, therefore, his license in such cases can constitute no excuse. He can never consent, for instance, to the taking of his own life," &c. With all due respect it is suggested that a man who requests another to kill him and permits him to do it, does assent to the taking of his life. A man who participates in a duel or engages in a fight *does* impliedly consent to whatever injuries he may receive in the natural course of the combat. The theoretical distinction that should be made is, that as far as criminal complexion is concerned, the assent or license is ignored in pursuance of public policy, while in civil cases the consent is material.

If a man voluntarily enters into a fight, or intentionally provokes one, there is strong practical ground for invoking, not only the principle *volenti non fit injuria*, but the somewhat cognate one, that no one may profit by his own wrong. It might have a disastrous effect upon the public peace, as well as frequently result in abstract injustice, if it were generally realized that a person could be as insulting and pugnacious as he pleased and still recover a round sum for damages, if he were actually overborne in the fight or suffered himself to be injured. It is gravely questionable whether the provision allowing the conduct of the plaintiff to be shown in mitigation of damages is a sufficient corrective or safeguard.

As above shown, however, the weight of authority is strongly in favor of the position taken by the Iowa court. The case of *Smith* v. *Simon* (69 Mich. 481), is, to an extent, in conflict with the other cases. It was there held that in a civil suit for assault and battery, on the trial of which the defendant's theory was that the fight was had by mutual agreement of the parties, in the absence of any testimony tending to show that the defendant was guilty of excessive cruelty, or of unneces-

sary and excessive beating, intending to do the injury complained of, it was error for the court to instruct the jury that they were at liberty to so find from the evidence. The implication of this holding would seem to be that it was necessary to show excessive cruelty in order to support the action at all.

There are also two cases in our own State which seem to us in effect, if not expressly, opposed to the weight of authority. In *Scott* v. *Railroad Co.* (53 Hun. 414) it appeared that the plaintiff got upon the front platform of one of the defendant's cars and commenced an altercation with the driver, using language which was calculated to bring about a personal encounter, which result followed, to the injury of the plaintiff. It was held error for the trial judge to refuse to charge, among other things, that if the jury believed that the plaintiff commenced the altercation and, in the course of it, addressed indecent and insulting language to the driver, and language which was calculated or likely to produce the assault, the verdict must be for the defendant.

In *Weber* v. *Railroad Co.* (47 App. Div. 306), the Appellate Division in the Second Department was of opinion that the General Term in the last cited case went too far in holding that the use of language merely calculated or likely to produce an assault was sufficient to prevent a recovery. The Appellate Division went on to say, however, that "to avoid any possible misunderstanding it may be well to add that, of course, the passenger could not recover if he used the provoking language with the intent of bringing about the assault which followed." Such *dictum* in the Weber case would be sufficient to cover the instance of a voluntary or provoked fight. It is, of course, not to be overlooked that these New York cases were actions against common carriers for assaults committed by their employees, but as far as the legal ethics of the plaintiff's position are concerned, we do not see why they should not apply by analogy to any case where a man deliberately engages in an altercation.—*New York Law Journal.*